

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KEN A. LEARNED

Claimant

VS.

GRIFFITH STEEL ERECTION, INC.

Respondent

AND

OLD REPUBLIC INSURANCE CO.

Insurance Carrier

Docket No. **1,047,070**

ORDER

Respondent and its insurance carrier request review of the January 7, 2010 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The Administrative Law Judge (ALJ) found claimant suffered a compensable injury when he suffered an aggravation to his preexisting back condition in a fall at work.

Respondent requests review of whether claimant suffered an injury to his back in the fall at work. Respondent argues claimant was being treated for low back complaints before the fall at work and a comparison of MRI's performed before and after the fall revealed no significant change in his back condition. Consequently, respondent further argues that claimant has failed to establish that he suffered a workplace injury to his back arising out of and in the course of his employment.

Claimant argues the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On January 14, 2009, claimant fell off a roof beam and landed on the concrete floor.¹ He was knocked unconscious and was transported to Newton Memorial Hospital. He was then transferred to Wesley where he remained in a coma for approximately seven to nine days. Claimant suffered multiple injuries to his left upper extremity, both heels, both hips, his collar bone, head, teeth, and brain trauma.

Before the accident, claimant had been treated for low back problems by Dr. John G. Fan in Hutchinson, Kansas. Claimant had pain in his low back at the belt line up to his rib cage. He was being treated with narcotic pain medication and Dr. Fan planned to refer claimant to a spine surgeon. And an appointment had been scheduled. An MRI of claimant's lumbar spine was performed on January 6, 2009, and was interpreted as showing neural foraminal narrowing with a posterior annular tear at L3-4 but with no focal disk extrusion at any lumbar level.

Claimant was provided treatment for numerous injuries suffered in the fall at work. Among the doctor's providing treatment, claimant was provided treatment with Dr. Pastor Causin. After the accident an MRI of claimant's lumbar spine was performed on October 8, 2009, and was interpreted as showing degenerative disk dessiccation and narrowing with central and posterolateral bulge with no indication of stenosis or nerve root crowding. Dr. Causin requested an opinion from Dr. Norman Pay to compare the two MRI studies and that Dr. Pay indicated there was no significant change to note. Consequently, Dr. Causin concluded claimant's chronic back pain was a pre-existing condition.² Conversely, claimant's personal physician, Dr. Sharon Norris opined that claimant's condition was caused or aggravated by his work.³

Claimant testified that before the fall at work his back pain was at the belt line up to the top of his rib cage. After the fall at work claimant noted that his back pain worsened and that he now has significant pain and numbness down his left leg into the sole of his foot. And he stated he never had the leg and foot complaints before the fall at work.

Tammy Learned, claimant's wife, testified that claimant now has increased back pain. She further testified that because of his back pain claimant is also less able to do physical activity and has had an increase in mobility issues after the fall at work.

¹ The claimant testified he fell approximately 25 feet but his wife testified she was told the fall was 12 to 13 feet.

² P.H. Trans., Resp. Ex. 1.

³ *Id.*, Cl. Ex. 1.

The indications section of the report from the MRI performed before claimant's fall at work noted that claimant had pain radiating down the right leg into the knee.⁴ The indications section of the report from the MRI performed after claimant's fall at work noted that claimant had low back pain with numbness in the left leg to the foot.⁵

Respondent does not dispute claimant suffered accidental injury at work and has provided claimant medical treatment for the injuries suffered with the exception of claimant's back complaints. As previously noted, respondent argues claimant's back condition is preexisting and the fall did not cause or change that condition.

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.⁶ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁷

The claimant testified that his back condition was worsened by the fall and it is significant to note that he now complains of a new symptom, pain and numbness into his left leg and foot, that he did not experience before the fall at work. And a comparison of the two MRI reports indicates that before the fall he had right leg complaints and after the fall he now has left leg complaints into the foot. Based upon the evidence compiled to date, this Board Member finds claimant has met his burden of proof to establish that the fall at work aggravated and intensified his preexisting back condition and affirms the ALJ's Order.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁸ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁹

⁴ *Id.*, Resp. Ex. 2.

⁵ *Id.*, Resp. Ex. 3.

⁶ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

⁸ K.S.A. 44-534a.

⁹ K.S.A. 2009 Supp. 44-555c(k).

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 7, 2010, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of March 2010.

DAVID A. SHUFELT
BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Matthew J. Schaefer, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge